Petition

81-257

No.

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IN THE

Supreme Court of the United States

JULY TERM, 1981

STATE OF MISSOURI *ex rel*
DONALD L. WOLFF,
Petitioner,

vs.

HON. JAMES RUDDY, JUDGE,
Judge, Circuit Court, St. Louis County,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court
for the State of Missouri

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QUESTIONS PRESENTED

1. Whether the Supreme Court of Missouri failed to protect Petitioner's constitutional right to freedom from involuntary servitude by dismissing his action to prohibit Respondent from compelling him to defend an indigent accused without any possibility of compensation or reimbursement for expenses.

2. Whether compulsory representation of an indigent accused by an attorney without providing funds for expenses or compensation denies such accused due process, equal protection under the law, and the right to a reasonable defense and fair trial.

3. Whether the failure of the General Assembly to adequately fund the State Public Defender Bureau, to provide funds for the representation of indigents charged with serious crimes, renders the legislation establishing such Bureau invalid as being repugnant to the Constitution of the United States by virtue of its authority to compel involuntary uncompensated services to indigents by attorneys.

4. Whether the compelling of an attorney's representation of indigents without compensation or reimbursement violates his constitutional rights and constitutes a taking of his property without due process of law or just compensation.

PARTIES INVOLVED

The interested parties to this proceeding were Donald L. Wolff, Relator; Hon. James Ruddy, Circuit Judge, Respondent; Missouri Association of Criminal Defense Lawyers, amicus curiae; Missouri Bar Association, amicus curiae.

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PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court
for the State of Missouri

Donald L. Wolff, Petitioner prays that a writ of certiorari be issued to review the order of the Missouri Supreme Court dismissing the preliminary rule in prohibition entered on his behalf against Respondent.

OPINION BELOW

This was an action in prohibition. The opinion and order of the Missouri Supreme Court, dated May 7, 1981, was not reported and is attached as Appendix A. The petition for rehearing and the order overruling said petition are attached as Appendix B and Appendix C.

JURISDICTION

The final judgment of the Missouri Supreme Court (Appendix A) dismissing the preliminary rule in prohibition was entered May 7, 1981; the petition for rehearing was overruled June 8, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

STATUTES AND RULES INVOLVED

1) The Constitution of the United States, Amendment V, provides:

> . . .nor shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2) The Constitution of the United States, Amendment VI, provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

3) The Constitution of the United States, Amendment XIII, provides:

> Section 1. Neither slavery not involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

4) The Constitution of the United States, Amendment XIV, provides:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws.

5) The revised Statutes of Missouri, § 600.046, provides:

> Whenever a person charged with a felony, a misdemeanor which will probably result in confinement in the county jail upon conviction, or with a violation of probation appears before a judge without counsel, the circuit court shall advise the defendant that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel. Unless the defendant waives representation by counsel, the judge, if satisfied after appropriate inquiry that the defendant is financially unable to obtain counsel, shall appoint separate counsel for defendants having interests that cannot properly be represented by the same counsel, or when other good cause is shown.

6) The Revised Statutes of Missouri, § 600.056, provides:

> In all judicial circuits where there is a circuit public defender, the public defender or a member of the private bar shall be appointed to represent and defend indigent persons as required or as may be deemed necessary under this section. In all judicial circuits where there is no public defender, members of the private bar shall be appointed as required or deemed necessary.

7) The Revised Statutes of Missouri, § 600.066, as amended 1980, provides:

> A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before a magistrate or circuit court through appeal including ancillary matters appropriate to the proceedings and shall extend to any court, within or without the circuit, to which the cause may be taken upon

change of venue or appeal. An appellate court may appoint counsel or the public defender from the circuit from which an appeal is taken or from which a petition for writ of habeas corpus is filed; except that, no public defender shall be appointed to represent a defendant who has filed a motion seeking relief pursuant to rule 27.26 of the Missouri rules of court, except when a defendant is entitled to appointed counsel by constitutional requirement. If at any stage of the proceedings, including an appeal, a magistrate, a circuit court or an appellate court finds that a defendant is financially unable to pay counsel whom he had retained, and because of indigency is unable to employ counsel, counsel may be appointed as provided in this section. In the event of appeal appointed counsel shall file a written brief on behalf of the indigent person, and may argue the case before the appellate court.

8) The Revised Statutes of Missouri, § 600.150, provides:

1. Counsel, other than a public defender, appointed by a court in any circuit to represent an indigent person shall, at the conclusion of the representation, or any part thereof, be reimbursed for actual expenses reasonably incurred for investigative, mental and physical examinations, expert or other services necessary in the representation or defense of the person. . . The court may allow the claim for reimbursement of expenses and the court shall, in addition, fix a reasonable fee for the services of counsel to be paid to such counsel for the representation, . . . Both the reimbursement of expenses and the attorney's fee for services shall be paid by the state from funds appropriated for that purpose.

9) The Revised Statutes of Missouri, § 600.160, as amended 1980, provides:

Under no circumstances may the expenditures from general revenue for the purposes provided in sections 600.010 to 600.160 exceed the amount, five million dollars, if and when appropriated by the general assembly for such purposes.

STATEMENT

On March 27, 1981, Petitioner was notified by court memorandum that it was the intention of the Respondent, on April 15, 1981, to appoint Petitioner to represent one Joann Williams, an indigent charged with three counts of Robbery First Degree, unless prohibited by the appellate court. Respondent further advised that because of the circumstances of the appointed counsel fund, the Petitioner would not be paid or reimbursed for any of his expenses.

On April 14, 1981, Petitioner applied to the Missouri Supreme Court for a writ of prohibition against Respondent, at which time he requested and was granted a stop order commanding Respondent to refrain from making such appointment until further order of the court. In his application for the writ, Petitioner advised the Court, inter alia, that:

(a) he was not employed by any governmental agency that provides for the defense of indigents;

(b) based on prior experience, he anticipated the minimum cost for expenses and time necessary to properly defend the indigent accused to be $15,000.00;

(c) he had been informed that no funds were available for payment of his expenses, or any portion thereof, in defending such indigent accused;

(d) because of a potential conflict of interest, such indigent could not be represented by the Public Defender of St. Louis County, Missouri.

A preliminary rule in prohibition was officially issued on April 23, 1981, returnable on or before May 4, 1981. On that same day the court sustained the motion of the Missouri Association of Criminal Defense Lawyers to file a brief as amicus curiae. Permission was also granted to the Missouri Bar Association to file a brief as amicus curiae.

On oral request of the Respondent, the court extended the return date of the preliminary rule to May 11, 1981.

On May 7, 1981, the court, sua sponte, issued its opinion and order quashing the preliminary rule in prohibition (Appendix A).

At the time of the filing of Petitioner's petition for rehearing (Appendix B), the court permitted the Missouri Bar Association as amicus curiae to file suggestions in support thereof (Appendix D).

On June 8, 1981, the court entered an order denying the petition for rehearing (Appendix C).

FEDERAL QUESTIONS RAISED

Petitioner raised the federal questions presented herein when filing his Petition for Prohibition Against Circuit Court on April 14, 1981, as follows (at page 3 thereof):

"13. That the Respondent's intended action constitutes involuntary servitude as affirmatively protected by the United States Constitution, Amendment XIII, Section 1.

14. That the intended action of the Respondent denies relator equal protection of the law, as guaranteed by the United States Constitution, Amendment XIV.

15. That the intended action of Respondent will effectually deprive relator of property without due process of law and constitute the taking of private property for public use without just compensation, all in violation of his rights under the United States Constitution, Amendment V, and the Missouri Constitution, Article I, Section 10."

Petitioner again invoked the provisions of the United States Constitution in his Motion for Rehearing (Appendix B), paragraphs 5 and 6.

These issues were never directly addressed by the Missouri Supreme Court, and the question of whether these rights would be violated remains unanswered.

REASONS FOR GRANTING THE WRIT

1.

One of the initial precepts upon which our country was founded was freedom from involuntary servitude. It dates from the time of ratification of our Constitution, when Congress enacted the Northwest Ordinance of 1787, 1 U.S.C. at pp. xxxiii-xxxv (1946 ed.), and was added to the Constitution in 1865 as Amendment XIII:

> Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Jacobus tenBroek, the authority on the Thirteenth Amendment wrote:

> The Thirteenth Amendment nationalized the right of freedom. It thereby nationalized the equal right of all to enjoy protection of these natural rights which constitute freedom. 39 Calif. L. Rev. at 203.

By court memorandum[1] dated March 27, 1981, Circuit Judge James Ruddy, the Respondent herein, advised Petitioner that he intended to appoint him to represent an indigent charged with three counts of Robbery in the First Degree. The Court went on to state:

> . . . Under the present status of the appointed counsel fund, said attorney will not be paid or reimbursed for any of his expenses.

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[1] The memorandum of the Court is incorporated by reference in Petitioner's Petition for Prohibition and attached as Exhibit A thereto.

In response to Petitioner's petition for prohibition, the Missouri Supreme Court issued the following order:

> Preliminary rule in prohibition ordered to issue returnable in ten (10) days *unless* within five (5) days hereof *respondent deletes the final sentence from his order* of March 27, 1981 and notifies the Clerk of this Court accordingly. See Section 600.150 RSMo 1978 and order of this date in cause No. 62976. (emphasis added)

Respondent did not delete the offending sentence and the preliminary rule was issued.

However, inasmuch as the Court subsequently dismissed the preliminary rule, Respondent's order of March 27, 1981 stands, and Petitioner will be compelled to defend said indigent without any compensation or reimbursement of expenses, under pain of contempt and possible imprisonment.

This violates a federal holding that a court has no power to compel a member of the bar to represent a defendant in proceedings in forma pauperis and this compel involuntary services, but may only request that the attorney act. 45 Am.Jur. Involuntary Servitude 9; *U.S.* v. *Leser,* D.C.Cal 1964, 233 F.Supp. 535, remanded on other grounds 335 F.2d 832, *cert. denied* 85 S.Ct. 692, 379 U.S. 983, 13 L.Ed.2d 574, rehearing denied 85 S.Ct. 910, 380 U.S. 928, 13 L.Ed.2d 817.

Although the State of Missouri has enacted legislation providing for payment of appointed counsel, (Laws of Mo 1972, at 1035 et seq.) at the time of Respondents order no funds were available to make such payment. In dismissing the preliminary rule in prohibition, the Missouri Supreme Court set out guidelines purporting to ease the financial burden imposed on appointed counsel, but made no order compelling Respondent to allow payment or reimbursement to Petitioner. Therefore, such "guidelines" do not protect this Petitioner unless Respondent is ordered to delete the final sentence of his Order of

March 27, 1981 and any future orders of appointment of counsel for indigents.

By forcing Petitioner to accept an appointment to defend an indigent accused, without possibility of a fee or even reimbursement for necessary expenses of such defense, or face the possibility of disciplinary action, Petitioner is relegated to the position of involuntary servitude in contravention of Amendment XIII of the United States Constitution.

In *Tyler* v. *Heidron,* 46 Barb. (N.Y.) 439, 458 (Albany General Term 1866) the Supreme Court of New York defined "involuntary servitued" as "embracing everything under the name of *servitude* . . . which given to one person the control and ownership of the involuntary and compulsory *services* of another against his will and consent."

Seven years later in *The Slaughter-House Cases,* 83 U.S. (16 Wall.) 36, 69, 21 L.Ed. 394, 406, Mr. Justice Miller wrote:

> The exception of servitude as a punishment for a crime gives an idea of the class of servitude that is meant. The word "servitude" is of larger meaning than "slavery", as the latter is popularly understood in this country. . .

Petitioner has committed no crime, and absent being duly convicted of crime the prohibition of the Thirteenth Amendment is absolute. tenBroek,[2] 39 Calif. L. Rev. at 172.

The question of pressing importance to the legal profession and the community at large is, whether the right to assistance of counsel under the Sixth Amendment (*Gideon* v. *Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799) is of such a "com-

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[2] tenBroek, "Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment," 39 Calif. L. Rev. 171 (1951).

pelling state interest" as to penalize the exercise of another right (the equal right to enjoy protection of those natural rights which constitute freedom) expressly safeguarded by the Constitution and regarded as equally fundamental.

While Petitioner sincerely believes that those individuals who cannot afford adequate legal representation *must* be represented by counsel, the necessity in carrying forth the mandate in *Gideon* v. *Wainwright, supra,* cannot deny the rationale of the Thirteenth Amendment's prohibition against involuntary servitude.

In *Butler* v. *Perry,* 240 U.S. 328, 36 S.Ct. 258, 60 L.Ed. 672 (1916), Justice McReynolds wrote of the Thirteenth Amendment:

> This Amendment was adopted with reference to conditions existing since the foundation of our government, and the term "involuntary servitude" was intended to cover those forms of compulsory labor akin to African slavery, which, *in practical operation would tend to produce like undesirable results.* (emphasis added)

The compulsory appointment of Petitioner in the case at bar "would tend to produce like undesirable results" akin to slavery. This was brought out in detail by Chief Judge Hall in *United States* v. *Leser, supra,* when he likened the power of a court to compel a member of the bar to labor without compensation on behalf of an indigent to that of "compelling the defendants to pick cotton for a private individual".

In *Hodges* v. *United States,* 203 U.S. 1, 27 S.Ct. 6 at 8, 51 L.Ed. 65 (1906), Mr. Justice Brewer wrote:

> All understand by these terms (slavery and involuntary servitude) a condition of enforced compulsory service to one another. While the inciting cause of the Amendment was the emancipation of the colored race, yet it is not an attempt to commit that race to the care of the nation. It is a

> *denunciation of a condition,* and not a declaration in favor of a particular people. (emphasis added)

As stated in a Comment in 60 Kentucky Law Journal 710, 716-717:

> An attorney assigned to defend an indigent accused is being compelled to render the gratuitous service by the threat of a contempt judgment. If an attorney refuses the appointment he risks a possible fine, imprisonment, and loss of his livelihood. This form of coercion plus the fact that many attorneys perform these services unwillingly results in nothing less than voluntary servitude. The fact that attorneys are being forced to perform these gratuitous services because of an obligation to which they are said to owe to the court amounts to "peonage". (footnotes omitted)

It was just this situation which the General Assembly of Missouri sought to redress by enacting the Public Defender Act. However, the statutes pertaining to the appointment of counsel to defend an indigent accused and the reimbursement of such service have, for all practical purposes, been rendered invalid by the failure of the legislature to adequately fund such enactment. Consequently, the attorneys of Missouri must look to this Court for protection of their constitutional rights against compelled, involuntary servitude.

2.

It has been well stated that the indigent criminal defendant is not afforded due process or equal protection of the law when only unpaid counsel are available, particularly under the assigned counsel system. Brownell, Legal Aid in the United States (1951)138; *Douglas* v. *California,* 372 U.S. 353; *Powell* v. *Alabama,* 387 U.S. 45.

Our constitution doesn't guarantee to an indigent merely the right to counsel; it states that he should receive the *effective*

assistance of counsel. *Gideon* v. *Wainwright, supra; Mason* v. *Arizona,* 504 F.2d 1345 (9 Cir.1974), *cert. denied* 420 U.S. 936, 95 S.Ct. 1145, 43 L.Ed.2d 412 (1975); *United States* v. *Germany,* 32 F.R.D. 421, 425 (M.D.Ala.1963).

This right was recognized by the Missouri Supreme Court in *State* v. *Brown,* 559 S.W.2d 498 (1980), when it held:

> . . . It is also true that the equal protection clause requires that the state "provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners. (citations omitted)

The inequities of a system of uncompensated appointed counsel for indigent defendants were also addressed by Sen. Sam J. Ervin, Jr.,[3] writing in support of the establishment of a federal public defender system, when he stated:

> A fundamental principal of our nation is that law, not force, maintains the social order, and yet each year thousands of defendants are brought before the federal bench without benefit of paid counsel. The forces of the government, with experienced prosecutors, trained investigating staffs and expert witnesses, are pitted against a defendant whose appointed counsel must find the spare time to defend without compensation. ...

He went on to quote the remarks of Judge Augustus N. Hand, Chairman of the Judicial Conference of the United States, who had said:

> To distribute such assignments (unpaid service to indigents) among a large number of attorneys, in order to

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[3] Ervin, "Uncompensated Counsel: They Do Not Meet the Constitutional Mandate", 49 A.B.A.J. 436 (1963).

> reduce the burden upon anyone, is to entrust the representation of the defendant to attorneys who in many cases are not provicient in criminal trials, whatever their general ability, and who for one reason or another cannot be depended upon for adequate defense. Too often, *under such circumstances, the representation becomes little more than a form.* (emphasis added)

Paradoxically, at the time it dismissed Petitioner's action to prohibit uncompensated appointments, the Missouri Supreme Court recognized that under conditions extant in this State "accused indigents are being deprived of a reasonable defense by reason of lack of available funds necessary to prepare a proper defense for the accused." *Opinion of Court,* p. 5 (Appendix A).

The indigent defendant in this case, Joann Williams, has been charged with three (3) counts of Robbery, First Degree, each of which offenses carries punishment of a minimum of ten (10) and a maximum of thirty (30) years' imprisonment. Petitioner, an experienced practitioner in the criminal field, advised the Court in his petition that the necessary expenses and time involved in provising Ms. Williams a reasonable and adequate defense of such offenses would amount to approximately $15,000.00. Because of the conflict created by the State Public Defender's decision to represent her two male co-defendants, this accused, as well as others in like situations, is denied the state-financed assistance afforded others and must rely on the charity of unpaid counsel. The private attorneys, as Petitioner, in most instances do not have comparable staff and budgets provided by the government to both the prosecution and the Public Defender.

As stated by Justice Black in *Griffin* v. *Illinois,* 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956):

> Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, "stand on

> an equality before the bar of justice in every American court". (citations omitted)

This principle cannot be adhered to if defendant, by reason of being indigent, is represented by counsel who cannot be reimbursed even for the necessary expenses of her defense as, for example, investigation, depositions, expert witnesses, and various other trial necessities, all of which are available to the prosecution and her co-defendants represented by the Public Defender.

This problem was recently recognized in California, when Associate Justice Hopper stated:

> If a lawyer cannot realistically accept an uncompensated appointment without catastrophic result to his family, and no funded legal services group is available because (as here) there is a conflict of interest, the indigent prisoner will end up with either (1) no counsel, (2) counsel only because the particular appointee has independent means, (3) counsel with limited experience but willing to take the case, of (4) appointed counsel under a system of forced labor that would violate the constitutional prohibition against involuntary servitude. ... Thus, the indigent's purported right to an attorney ... becomes a mere paper right. *County of Fresno* v. *Superior Court of Fresno City,* 146 Cal. Rptr. 880, 887 (dissenting opinion)

That private counsel cannot do an adequate job without adequate financial support was likewise pointed out by Chief Judge Edward Lumbard of the Second Circuit Court of Appeals. In respect to indigent appointments, he stated:

> (The) uncompensated lawyer makes a farce of due process of law and our Bill of Rights. Every one who participates in the farce knows this—the judge, the district attorney, the assigned lawyer, the bailiff, and of course the defendant himself. *Gideon's Trumpet,* pp. 199-200, Vintage Books, Vintage Edition, 1966, Anthony Lewis.

In an attempt to deal with this problem, the Missouri Court set out certain "guidelines". One of these, Paragraph 4 *(Opinion of Court,* pp. 6-7), proposes that the accused be discharged if either funds or appointed counsel are not available. While this practice will undoubtedly be heralded in some circles, it certainly does not serve the ends of justice. Neither is the judicial system enhanced by the practice of random appointments for the defense of criminal indigents. "Society is not well protected when an accused is convicted due to inadequate representation. ... Nor is society protected because of a technical error in the legal process. Law enforcement officers and prosecutors strongly prefer that adequate defense be available for persons accused of crime. ..." Ervin, "Uncompensated Counsel", *supra,* n.6. The remedy afforded by such guideline might evoke the rage and outcry of the public necessary to produce adequate appropriations by the legislature for defense of the indigent, but at what expense to public safety and our system of law enforcement?

Many jurisdictions have enacted valid, enforceable legislation to provide an appointed attorney with some measure of compensation and reimbursement for necessary out-of-pocket expenses for services performed on behalf of an indigent defendant,[4] as has the federal government under the Federal Criminal Justice Act of 1964. It is clear, therefore, that indigent defendants in Missouri are being denied equal protection of law by virtue of the failure of the General Assembly to provide funds for their defense.

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[4] 7 Am.Jur.2d Attorneys at Law § 244, citing, e.g., statutes of Nevada, Wisconsin, Oklahoma, North Carolina.

3.

In response to the mandate of the Missouri Supreme Court in *State* v. *Green,* 470 S.W.2d 571 (En Banc 1971), the General Assembly enacted the Public Defenders and Defenses Act (L.1972, pp. 1035 et seq.). The pertinent portions of this legislation were:

Section 1. The appointment of public defenders;

Section 8. The appointment by a judge of the public defender "or other counsel" to defend an indigent;

Section 10. The authority of the court to appoint private counsel for the indigent in relief of the public defender;

Section 12. Reimbursement to private appointed counsel for expenses and the authority of the court to award a reasonable fee for such counsel's services, to be "paid by the state from funds appropriated for that purpose".

By enacting such provisions, the legislature responded affirmatively to the directive of the court and attempted to provide a permanent solution to the problem then existing, i.e., the unreasonable burden with which the Bar was then saddled, to provide assistance to the indigent.

Section 12 of such Act eventually became Sec. 600.150, R.S.Mo., the language of the Act remaining unchanged. This statute provides, in Section 1:

> ... Both the reimbursement of expenses and the attorney's fee for services shall be paid by the state *from funds appropriated for that purpose.* (emphasis supplied)

One must presume that the General Assembly, in enacting this law, was in good faith and intended to regularly appropriate the funds necessary to make the Act valid and enforceable.

However, due to its failure to adequately fund such program, there is now no money available for either reimbursement or compensation of appointed counsel. This absence of appropriated funds renders such section (600.150) void and the remaining portions of the Act unconstitutional.

It is stated in 7 Am.Jur.2d Attorneys at Law § 244, that:

> A statute that had the effect of forbidding the allowance of an attorney's fee for defense of an indigent in a criminal case unless there was an *existing appropriation* for the payment of the fee has been held unconstitutional in that it deprived the court of its inherent power to give full effect to the constitutional right of an accused to be represented by counsel.[3] (emphasis added)

What is left of the original Act, therefore, as regards the appointment of private counsel to serve the indigent, is the bare authority for the courts to make such appointment, without any provision for compensation unless there is an "existing appropriation". Consequently, those remaining pertinent sections of the Act, and in particular Sections 8 and 10, are contrary to the Thirteenth Amendment of the United States Constitution (forbidding involuntary servitude) and are void. *U.S.* v. *Leser, supra.* See also *The Civil Rights Cases,* 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 at 842-843 (1883), wherein Mr. Justice Bradley for the Court held:

> ... Should any such (involuntary) servitudes be imposed by statute ... there can be no doubt that the law ... would be repugnant to the 14th, no less than to the 13th Amendment, nor any greater doubt that Congress has adequate power to forbid any such servitude from being exacted.

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[3] *People ex rel. Conn* v. *Randolph,* 35 Ill.2d 24, 219 N.E.2d 337, 18 ALR.3d 1065; *Knox County Council* v. *State,* 217 Ind. 493, 29 N.E.2d 405, 130 ALR 1427.

Today, a decade after *State* v. *Green, supra,* Petitioner and other attorneys in Missouri are cast in the position as if the Public Defenders and Defenses Act had never been passed. In *Green,* Judge Donnelly, speaking for the Court, ruled that after September 1, 1972, they would not compel the attorneys of Missouri to discharge alone "a duty which constitutionally is the burden of the State". 470 S.W.2d at 573. The one-year grace period was to permit the General Assembly to "have the opportunity to respond to the position taken (that day) by (the) Court ...". *Id.*

In as much as the legislative response to such decision has been rendered void by its failute to provide funds for reimbursement and compensation of appointed counsel, it is now incumbent upon the Missouri Supreme Court to follow its prior ruling and prohibit courts from compelling the involuntary, uncompensated representation of indigents.

4.

It is basic to our system of justice that an accused may not be deprived of counsel because of lack of funds. Usually such representation is provided by the state or federal Public Defender, a paid employee of the government, but in instances where a conflict of interest arises, for example because of the Public Defender's representation of co-defendants, as here, Missouri courts in the past have appointed members of the private bar to represent such persons and have provided state funds to compensate them under Section 600.150, R.S.Mo. However, in the present absence of appropriations for such compensation, this statutory provision is void (as discussed above) and courts are now attempting to compel attorneys to provide representation at their own expense. This is a denial of equal protection.

The due process clause of the Fourteenth Amendment of the United States Constitution should apply no less to attorneys

than to the indigent. In a 1963 speech regarding representation of the indigent being public responsibility, Whitney North Seymour, then head of the American Bar Association's special committee on counsel for the indigent, stated:

> Just as doctors are not expected to provide all facilities for dealing with illness of the poor, lawyers cannot be expected to bear all burdens of the decisions of prosecutors to prosecute the indigent. ... These are not obligations imposed by the Constitution upon the bar alone, they are obligations imposed by the Constitution upon the operation of our system of criminal justice. They are as much a part of the public obligation to support that system as the provision of courthouses, judges, attendants and prosecutors. *Gideon's Trumpet, supra,* pp. 195, 197-198.

In reaching its decision in the instant cause, the Missouri Court apparently read Missouri Supreme Court Rule 4, Ethical Considerations 2-25 and 2-29,[6] as mandatory rather than suggestive, which is contrary to its earlier view in *State* v. *Brown, supra.* To interpret it so, and thus compel the attorneys of Missouri to represent indigents without compensation, would be to deny to a certain profession the equal protection of the law.

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[6] *EC 2-25* provides: "... The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of the lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. ..." *EC 2-29* provides: "When a lawyer is appointed by a court requested by a bar association to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, he should not seek to be excused from undertaking the representation except for compelling reasons ..."

At no time in our history has it ever been suggested that the prosecution or judiciary "contribute" that portion of its time which relates to the processing of indigent criminal cases. The only arm of the criminal bar which suffers under this practice is defense counsel. Although the proposition has been advanced that service to the poor is a condition incident to the licensing of attorneys, *U.S.* v. *Dillon*, 346 F.2d 633, Judge Finch, dissenting in *Green, supra*, strongly took issue with such conclusion, pointing out that others licensed by the State are not so obligated. Professional prople, including prosecutors, attorneys general and physicians, "all licensed for such practice, are not expected to, and do not, as a general proposition, perform these services without compensation." 470 S.W.2d at 576.

By entering its Order quashing the preliminary rule in prohibition earlier granted on behalf of Petitioner, "without prejudice to reapply for extra-ordinary relief at any time that it may appear that the indigent accused is being denied a reasonable defense and a fair trial" (Opinion p. 8, Appendix A), the Missouri Supreme Court has foreclosed any opportunity for Petitioner, as well as other attorneys in Missouri, to seek protection of *his* constitutional rights and liberties by that Court.

Notwithstanding the view of Missouri courts, the Supreme Court of Kentucky found that requiring an attorney to provide services gratuitously was a "taking" within the meaning of the Constitution. *Bradshaw* v. *Ball*, 487 S.W.2d 294 (1972). Although that Court held that an appointed attorney was not entitled to pay for his services, it also ruled that attorneys would no longer be constitutionally *required* to provide services gratuitously. The court explained:

> No other profession in recent years has been expected to bear such a burden for services to the indigent without compensation—not even reimbursement of necessary expenses was allowed. Therefore, we conclude as did the learned trial judge

> that the time has arrived to declare the burden of such service a substantial deprivation of property and constitutionally infirm.

This reasoning was followed by the Alabama Supreme Court in *Sparks* v. *Parker,* 368 So.2d 528 (1979), when it declared:

> It is therefore not within the sphere of the judicial branch to determine what appropriations are to be made although, of course, it would be within our purview to determine if the appropriations made are "adequate and reasonable" for the unified system or *so inadequate as to constitute the taking of property (services) without due process of law.* (emphasis added)

In the words of Sen. Ervin, "The lawyer himself should not fear indigency, while defending the indigent."[7]

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[7] Ervin, "Uncompensated Counsel, *supra* n.4; *County of Fresno* v. *Superior Court of Fresno City, supra.*

CONCLUSION

Petitioner respectfully submits that a writ of certiorari should be issued to review the judgment and Order of the Missouri Supreme Court, En Banc, inasmuch as that Court, by its Order, failed and refused to protect the constitutional rights of both Petitioner and the indigent accused.

Respectfully submitted,

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APPENDIX

APPENDIX A

SUPREME COURT OF MISSOURI
EN BANC

No. 62977

State ex el. Donald L. Wolff,
Relator,

vs.

Honorable James Ruddy, Judge,
Circuit Court, St. Louis County,
Respondent.

(Duplicate of Filing on May 7, 1981
In Office of Clerk Supreme Court)

PER CURIAM:

This is prohibition.

On March 27, 1981, respondent advised relator that, unless prohibited by an appellate court, he would, on or before April 15, 1981, appoint relator to defend Joann Williams, in State of Missouri v. Joann Williams, No. 452742, pending in the Circuit Court of the County of St. Louis. As the last sentence of his order, respondent also stated: "Under the present status of the appointed counsel fund, said attorney will not be paid or reimbursed for any of his expenses."

On April 17, 1981, this Court entered an order which read in part as follows: "Preliminary rule in prohibition ordered to issue returnable in ten (10) days unless within five (5) days hereof respondent deletes the final sentence from his order of March 27, 1981 and notifies the Clerk of this Court accordingly. * * *." Our preliminary rule in prohibition issued on April 23, 1981.

In State v. Green, 470 S.W.2d 571, 572, 573 (1971), this Court addressed the question of a lawyer gratuitously furnishing legal services to an indigent accused and said:

> "In 1963, in Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L. Ed.2d 799, the United States Supreme Court held that the United States Constitution requires the State of Missouri, and other States, to furnish counsel to an indigent accused of crime. This means, in practical effect, that an indigent accused of crime cannot be prosecuted, convicted, and incarcerated in Missouri unless he is furnished counsel. The lawyers of Missouri, as officers of the Court, have fulfilled this State obligation, without compensation, since we attained statehood, although other persons essential to the administration of criminal justice (e.g. prosecuting attorneys, assistants to the Attorney General, psychiatrists, et al.) have not been asked to furnish services gratuitously. The question is whether the legal profession must continue to bear this burden *alone*." (Emphasis ours.)

The Court held in *Green* that the legal profession need not continue to bear the burden *alone*. The General Assembly of Missouri responded with enactment of Chapter 600, RSMo 1978. It must be said that its response has been less than resolute:

(1) In 1972, the General Assembly declared the public policy of Missouri to be that in cases where counsel, other than public defenders, are appointed to represent indigent defendants "the reimbursement of expenses and the attorney's fee for services shall be paid by the state from funds appropriated for that purpose." § 600.150, RSMo 1978.

(2) In 1977, the General Assembly declared, with certain stated exceptions, the public policy of Missouri to be that when a plea of not guilty is entered by an accused, his trial "shall

commence within one hundred eighty days of arraignment." The sanction imposed for failure of compliance is possible dismissal of the charge against the accused. § 545.780, RSMo 1978.

(3) However, in 1980, the General Assembly provided: "Under no circumstances may the expenditures from general revenue for the purposes provided in sections 600.010 to 600.160 exceed the amount, five million dollars, if and when appropriated by the general assembly for such purposes." § 600.160, RSMo Supp. 1980.

(4) And, for the fiscal year ending June 30, 1981, the General Assembly appropriated only a total of $3,475,894 for representation of indigent defendants.

We must recognize that as of the date of this opinion the money appropriated by the General Assembly for the fiscal year ending June 30, 1981, has been spent. The cupboard is bare.

What are we to do? "No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law * * *." Mo. Const. art. IV, § 28. We are reminded of our limitations by Alexander Hamilton in The Federalist No. 78: "The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither force nor will but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." *The Federalist Papers* 465 (New York: New American Library, 1961). However, we cannot permit the administration of criminal justice in Missouri to grind to a halt.

In these circumstances, we must turn again to the Bar of Missouri. We do so without apology.

The inherent nature of the practice of law has been described as follows:

> "The term 'profession,' it should be borne in mind, as a rule is applied to a group of people pursuing a learned art as a common calling in the spirit of public service where economic rewards are definitely an incidental, though under the existing economic conditions undoubtedly a necessary by-product. In this a profession differs radically from any trade or business which looks upon money-making and personal gain as its primary purpose. The lawyer cannot possibly get away from the fact that his is a public task. In all probability the professional relation of a lawyer to his client arose out of status rather than contract. It called, and still calls, for something more than a mere merchant-customer contract. It was, and still is, based on ideas more nearly akin to that of a fiduciary relationship than one which originated from the principle of *caveat emptor*. The general public has need for a professional man in whom it can repose a particular type of confidence whenever it is faced with some distressing problems, often of a very personal nature. Hence the most important aspect of the practice of law is the fact that it is, and the inherent nature of things demands that it always shall be, a profession."

Anton-Hermann Chroust, 1 *The Rise of the Legal Profession in America* x-xi (Norman, Oklahoma: University of Oklahoma Press, 1965).

The premise that practice of law "in the spirit of public service" is a *primary* consideration is articulated in EC 2-16 of Rule 4 of this Court:

> "The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered, and reasonable fees should be charged in appropriate cases to clients able to pay them. Nevertheless, persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective."

And, the lawyers of Missouri have taken and subscribed, in part, the following oath or affirmation prescribed in Rule 8.11:

> "I do solemnly swear * * *
>
> * * * * * * *
>
> "That I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any person's cause for lucre or malice. So help me God."

The question of lawyer professionalism was addressed in Bates v. State Bar of Arizona, 433 U.S. 350, 368 (1977), wherein the United States Supreme Court held that lawyers' rights to advertise are protected by the First Amendment to the Constitution of the United States and rejected the view that the "hustle of the marketplace will adversely affect the profession's service orientation, and irreparably damage the delicate balance between the lawyer's need to earn and his obligation selflessly to serve." We hope, of course, that the Court's assessment is accurate.

At the present time, the Court is becoming inundated with cases similar in nature involving non-payment of fees for the defense of the indigent. They include cases where accused indigents are being deprived of a reasonable defense by reason of lack of available funds necessary to prepare a proper defense for

the accused and cases where lawyers are alleging that they are being denied the right to earn a livelihood for their family or in effect are being placed in involuntary servitude contrary to the thirteenth amendment to the United States Constitution. Because of insufficient funding of the Public Defender Program for the defense of indigents, the problem is currently approaching crisis proportion.

In this background, the Court has concluded that the processing of the voluminous pending and threatened cases concerning representation of the indigent is neither economically desirable for the state nor is it in the best interest of the indigent accused, the legal profession, or the public.

We believe that the best interests of the state of Missouri and the orderly administration of justice require that we at this time declare and establish temporary guidelines for meeting the problem of defense of the indigent accused. We believe our primary obligation is to the people to insure the continued operation of the criminal justice system, for without it, the peace of the community cannot be attained as the guilty cannot be convicted nor the innocent be acquitted. As a necessary part of this system the accused is entitled to counsel and, where indigent, counsel must be provided. Our first obligation is to secure to the indigent accused all of his constitutional rights and guarantees. We also have an obligation to deal fairly and justly with the members of the legal profession who are subject to our supervision. To accomplish these ends, we direct and order that the following temporary guidelines be followed by the judiciary and the members of the legal profession until the problem of defense of the indigent accused can be resolved in an orderly process by the Executive, Legislative, and Judicial branches of our government.

1. In this case or any similar case, the respondent circuit judge is admonished by this Court to hold all accused to a high standard of proof of indigency and to make every effort possible to fully verify indigency.

2. In this and any similar case, the respondent circuit judge should provide relator when requested with an evidentiary hearing as to the propriety of his appointment, taking into consideration his right to earn a livelihood for himself and his family and to be free from involuntary servitude. If respondent judge determines that the appointment will work any undue hardships, he should appoint another attorney. After hearing, we call on all members of the legal profession who may be appointed to accept appointment to exert their best efforts in the defense of the indigent accused; and to refuse such service only with recognition that such refusal may be the subject of disciplinary action.

3. Non-payment to a lawyer for a period in excess of one hundred and twenty days for any prior appointed service may be deemed by the court to be grounds for excusing the lawyer from additional appointment in other cases.

4. We know of no requirement of either law or professional ethics which requires attorneys to advance personal funds in substantial amounts for the payment of either costs or expenses of the preparation of a proper defense of the indigent accused. If after evidentiary hearing, reasonable and necessary costs ordered advanced by the court are not forthcoming and available for preparation of the proper defense of the indigent within the time required by law for the trial of the accused, § 545.780, RSMO 1978, or where the court is unable to find and appoint counsel for the indigent accused who can prepare for trial within the time required by law, the court should on proper motion where necessary to protect the constitutional rights of the accused, order discharge of the accused.

5. Until further order of this Court, employment by government without further evidence of conflict with the interest of the indigent accused, shall not be deemed to be a bar to appointment by the Court to defend an indigent accused.

6. To assure that this situation shall not become worse and the failure of payment of such services become larger and more intolerable, the Public Defender Commission is requested that from appropriated funds, all approved fees and costs shall be paid in the order certified to and received by the Commission.

7. The Court will continue to urge the co-equal Executive and Legislative branches of government to each assume its share of responsibility for solution of the problem of defense of the indigent accused, realizing that the Court's action of this date is at best only temporary and stop gap because of the limitations upon our own power to make excessive demands upon those whom we are charged with supervising.

8. For a reasonable period of time pending the solution of this problem, the members of the legal profession are advised that in its discretion this Court will decline to hear other than the most extraordinary of applications for writs or extraordinary relief. We expect that each member of the legal profession, as he or she has throughout history, to continue to honor the oath "That I will never reject, from consideration personal to myself, the cause of the defenseless or the oppressed...", with complete confidence that this Court will do all within its power to protect the rights of indigent accused and to implement the public policy set forth in Chapter 600, RSMo 1978 & Cum. Supp. 1980, that those ordered to defend the indigent accused shall be fairly compensated for their expenses and services.

For the present, the preliminary rule in prohibition is ordered quashed, without prejudice to reapply for extraordinary relief at any time that it may appear that the indigent accused is being denied a reasonable defense and a fair trial.

All concur.

APPENDIX B

IN THE SUPREME COURT OF MISSOURI
EN BANC

Case No. 62977

State ex rel. Donald L. Wolff,
Relator,

vs.

Honorable James Ruddy, Judge,
Circuit Court, St. Louis County,
Respondent.

RELATOR'S MOTION FOR REHEARING

Comes now the relator, Donald L. Wolff, and moves and prays this Court to withdraw and set aside its opinion and judgment heretofore rendered on the 7th day of May, 1981, and to grant relator a rehearing of said cause; and as grounds for said motion relator states as follows, to-wit:

1. The decision of the Court was premature in that the return of respondent and briefs of the interested parties, allowed by this Court, had not as yet been filed.

2. The opinion and judgment is in conflict with prior controlling decisions of this Court, and in particular *State* v. *Green,* 470 S.W.2d 571 (1971).

3. The decision of the Court, with its accompanying guidelines, overlooks the fact that the respondent has not deleted that portion of his judicial order stating that relator "will not be paid or reimbursed for any of his expenses" in the representation of the indigent accused.

4. The Court has overlooked the fact that its judgment herein quashing the preliminary rule in prohibition, being the first ruling directly on this point subsequent to *State* v. *Green, supra,* has established a precedent for the denial of judicial protection to attorneys faced with appointments in the absence of funds for reimbursement of expenses or time, which precedent will override the guidelines contained in the dicta of the opinion.

5. The Court has misinterpreted the provisions of the United States Constitution, and in particular Amendment XIII, which forbid involuntary servitude of all individuals, not just those not licensed by the State to practice their profession.

6. The Court has misinterpreted the provisions of the Federal and State constitutions providing due process and equal protection of the law, as they apply to both relator and the indigent accused.

7. The opinion and judgment of the Court is vague and indecisive in its terms and does not address the issues raised in relator's Petition.

8. The guidelines set out in the Court's opinion and judgment lack the clarity and effectiveness necessary to provide to both Bar and Bench the means for remedying situations such as that at issue herein with regard to appointment of counsel for the indigent accused when no funds are available for reimbursement of expenses or compensation of services.

9. The Court has overlooked, or misinterpreted, the power and authority inherent to it to make appropriate orders to resolve the issues presented by this litigaton.

/s/ DAVID C. GODFREY, #15389
Attorney for Relator
130 S. Bemiston, Suite 502
Clayton, Missouri 63105
721-3383

Copies of the foregoing Motion for Rehearing were personally delivered to respondent, Hon. James Ruddy, Circuit Judge, St. Louis County, Clayton, Mo., and George Westfall, Prosecuting Attorney, St. Louis County, Clayton, Mo. this 21 day of May, 1981.

/s/ DAVID C. GODFREY

APPENDIX C

(Filed June 9, 1981)

Clerk of the Supreme Court
State of Missouri
Post Office Box 150
Jefferson City, Missouri
65102

Thomas F. Simon
Clerk

Telephone
(314) 751-4144

June 8, 1981

Mr. David C. Godfrey
130 S. Bemiston
Suite 502
Clayton, Missouri 63105

In re: State ex rel. Donald L. Wolff vs. Hon. James Ruddy
Judge, Circuit Court, St. Louis County Supreme Court
No. 62977

Dear Mr. Godfrey:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Realtor's motion for rehearing overruled."

Very truly yours,

/s/ Thomas F. Simon
Clerk.

cc: George Westfall
Hon. James Ruddy, Judge
Hon. Cullen Coil
Mr. Philip H. Schwartz

APPENDIX D

IN THE SUPREME COURT OF MISSOURI

Case No. 62977

State ex rel. Donald L. Wolff,
Relator,

vs.

Honorable James Ruddy, Judge,
Circuit Court, St. Louis County,
Respondent.

SUGGESTIONS OF AMICUS CURIAE ON BEHALF OF THE MISSOURI BAR IN SUPPORT OF RELATOR'S MOTION FOR A REHEARING

The effect of the opinion in the above entitled case is to overrule and nullify the case law in Missouri which has heretofore adopted and applied the inherent power doctrine, without stating any reason therefor.

Heretofore, and for many years past, Missouri has applied the inherent power doctrine which, simply stated, allows the judicial department to request, and if necessary demand, that the legislative department appropriate and provide sufficient funds to provide for all reasonably necessary purposes which are the duty of the judicial department to provide.

As a matter of fact, this Court's opinion, instead of recognizing the well established inherent power doctrine, reverts to and relies upon the words of Alexander Hamilton, which include:

> "The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have

> neither force nor will but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."

However true the foregoing quotation may have been at the time it was written, it is not true today and hasn't been for many years past.

On the contrary, as we shall demonstrate by Missouri cases, the judicial branch in Missouri has the inherent power to force the legislative department to appropriate and to order expended sufficient funds to carry into force and effect the provisions of duly enacted Missouri statutes including Sections 600.010 through 600.160, the Public Defender Act.

> "Both the reimbursement of expenses and the attorney's fee for services shall be paid by the state from funds appropriated for that purpose."

Section 600.160 limits the expenditures from general revenue for defense of indigents to five million dollars.

True, Section 600.160 says, "if and when appropriated by the General Assembly for such purposes"; but such language is not applicable to any present question for the reason that, as heretofore noted, Section 600.150 says expenses and attorney's fees "shall be paid by the State from funds appropriated for that purpose." Consequently, the "if and when appropriated" phrase is meaningless in view of the clear mandate of Section 600.150.

Furthermore, even if the "if and when appropriated" clause were an effective limitation, it would not limit the inherent power of a court to compel the appropriation of sufficient funds for specified legitimate judicial purposes.

There is an exhaustive note in 59 A.L.R.3d, entitled "Power of Court - Funds for Judicial Purposes."

We quote some of the presently applicable language in that note, and language from some Missouri cases which explain and demonstrate the court's power under the "inherent power doctrine."

At pages 587 and 588, 59 A.L.R.3d, it is said:

> "While occasional early cases to the contrary, the viable Indiana cases agree that the inherent power of the courts to compel the appropriation or expenditure of public funds to compensate attorneys appointed to defend indigents accused of crime cannot be limited by a state statute providing that no court may bind any county beyond existing appropriations.
>
> "The contention that there could be no allowance or recovery against the county to compensate attorneys appointed to defend a pauper charged with murder, in the absence of an existing appropriation by the county council for that purpose, which argument was based on a statutory provision that no court had the power to bind any county beyond existing appropriations, was rejected in *Knox County Council* v. *State* (1940) 217 Ind. 493, 29 N.E.2d 405, 130 A.L.R. 1427, wherein it was held that the trial court had inherent power to mandate the county council to appropriate sufficient funds to pay warrants issued pursuant to judgments of the trial court to compensate such attorneys. The court explained that to the extent that the statute was intended to strike down the jurisdiction of courts to make such allowances as were necessary to the carrying out of their constitutional functions, it was unconstitutional. In so holding, the court explained that power to appoint attorneys to defend indigent persons accused of crime was of constitutional origin and thus was not subject to the regulation and control of the legislature."

At page 617 (59 A.L.R.3d) it is said that:

> "The judiciary's inherent power to appoint counsel for the defense of indigents was held to necessarily include, under the extraordinary circumstances presented in *People ex rel. Conn* v. *Randolph* (1966) 35 Ill.2d 24, 219 N.E.2d 337, 18 A.L.R.3d 1065, the power to enter an order to require the state to compensate appointed counsel for their services. Mandating state officials to pay fees and expenses totaling approximately $31,000 to five attorneys appointed to defend four prisoners charged with the murder of three prison guards, the court observed that the petition and its supporting exhibits disclosed that the petitioners had incurred financial burdens and hardships far in excess of those normally attendant upon the defense of indigent persons in that they had been compelled to forsake their regular law practice during the trial, which had been transferred to a county some 160 miles from their home, and had been required to pay substantial travel and living expenses as well as the day-to-day costs of litigation, so that they were in such straitened fiscal condition that they were unable to continue payment of current trial costs, and at least one was close to the brink of insolvency. If the court's inherent power to appoint counsel did not include the power to enter an appropriate order insuring that counsel do not suffer an intolerable sacrifice and burden and that the indigent defendants' right to counsel is protected, reasoned the court, the courts probably could not proceed, and certainly could not conclude the trial of indigent defendants in cases such as the present one."

Furthermore, the Courts which have carefully considered the questions relating to inherent power, at pages 575, 576 (59 A.L.R.3d) "generally take the view that the ultimate inherent power of the courts to compel the payment of their reasonably necessary expenses cannot be defeated by atatute. *A contrary view, it has been said, would be to concede to the legislature the*

power by hostile legislation to destroy the judicial branch. Accordingly, it has been said, for instance, that a county could not so conduct its affairs under the budget law or any other law as to prevent the courts' existence and operation; that a state statute limiting the conditions under which a certain court employee could be appointed did not exclude the inherent power of the court to make such an appointment without regard to such conditions where necessary to prevent the impairment of its efficiency and the necessary conduct of its official functions; and that a statute purporting to limit the amount of compensation payable to court-appointed attorneys could not constitutionally be applied under exigent circumstances." (Our emphasis.)

The A.L.R.3d annotation heretofore referred to also observes at page 579 that:

> "The usual procedural device to compel appropriation for judicial purposes is mandamus (59 A.L.R.3d, p. 579)."

The author of the annotation also notes that in *State ex rel. Weinstein* v. *St. Louis County* (1970 Mo.) 451 S.W.2d 99, quo warranto was utilized.

We need not, however rely upon cases from other states to demonstrate that courts generally expercise the inherent power doctrine to compel the appropriation by the legislative branch of funds necessary to carry on the legitimate functions of the judicial branch. That is because Missouri cases demonstrate that the inherent power doctrine has been and is used by Missouri courts to compel the appropriation of funds for the purpose of accomplishing the necessary functions of judiciary.

In *State ex inf. Norman H. Anderson, Attorney General ex rel. Noah Weinstein, Judge, Relator,* heretofore referred to, 421 S.W.2d 249, this Honorable Court said at page 255:

> "In considering the questions here presented we should also have in mind the general rule that '[t]he courts have

the inherent power and authority to incue and order paid all such expenses as are (reasonably) necessary for the holding of court and the administration of the duties of courts of justice."

In *State ex rel. The State of Missouri, at the relation of the Judges For The Twenty-Second Judicial Circuit of the State of Missouri, Relators,* v. *The City of St. Louis, Missouri, etc., et al., Respondents,* 494 S.W.2d 39, this Honorable Court said at page 40:

"[1] The conclusions reached in the cases noted are also fundamentally correct, because (1) they preserve the integrity of the separate departments of government, and (2) they allow for a harmonious relationship between each of such departments. In this instance, they allow the judicial department to request, *and in fact to demand,* approval of all lawful expenditures required to perform its functions, and at the same time they accept the right to the legislative department to refuse to approve and appropriate funds for unlawful expenditures.

"[2] One basic question arises - what expenditures are lawful? Without any effort toward oversimplification, they may be classified as follows:

"1. Those the General Assembly has fixed by statute or absolutely resposed in the court's discretion.

"2. * * *

"3. Those reasonably necessary for the court to carry out its functions." (Our emphasis.)

The expenditures involved in the case at bar are fixed by statute, for as heretofore noted, Section 600.150 RSMo. provides in pertinent part:

> "Both the reimbursement of expenses and the attorney's fee for services shall be paid by the state from funds appropriated for that purpose."

In a concurring opinion in the case last cited one of the Judges in order to emphasize that the procedure suggested in the Weinstein case, *supra,* was to be used only when a real need is shown, said:

> "It authorizes the exercise of the inherent power of the court to provide things reasonably necessary to permit the court to perform its mission only if a genuine effort has been made to demonstrate an actual need, and only if a genuine effort to secure funding therefor through normal channels has been made."

It is confidently suggested that under no readily imaginable circumstances could there exist so demonstrable an actual need as the need for reimbursing attorney's expenses incurred and providing reasonable fees for legal work done.

That such is true is demonstrated by the fact that the General Assembly enacted a statute which provided that "the reimbursement of expenses and the attorney's fee for services shall be paid by the state from funds appropriated for that purpose," Section 600.150, RSMo.

It is true, of course, that to use the inherent power doctrine there must be a genuine need which has not been met by conventional means as stated in the concurring opinion in *State ex rel.* v. *The City of St. Louis,* 494 S.W.2d 39, 42, from which we again quote:

> "In the future, courts seeking to rely on the inherent power doctrine to secure personnel or facilities should understand that a genuine need must be shown and that they must diligently seek to have that need funded by con-

> ventional means. Only if such efforts fail and it is clear that the facilities are reasonably necessary for the court to perform its function is the doctrine to be applied."

Certainly, we submit, there could be no state of facts which satisfies the requirements of the foregoing directive better than the facts in the case at bar.

It is a matter of record, and this Court has set forth the facts at pages 2 and 3 of its opinion in the present case from which we quote to demonstrate the esistence of all the necessary preliminary facts for the use by this court of the inherent power doctrine:

> "(1) In 1972, the General Assembly declared the public policy of Missouri to be that in cases where counsel, other than public defenders, are appointed to represent indigent defendants 'the reimbursement of expenses and the attorney's fee for services shall be paid by the state from funds appropriated for that purpose.' Section 600.150, RSMo. 1978.
>
> "(2) In 1977, the General Assembly declared, with certain stated exceptions, the public policy of Missouri to be that when a plea of not guilty is entered by an accused, his trial 'shall commence within one hundred eighty days of arraignment.' The santion imposed for failure of compliance is possible dismissal of the charge against the accused. Section 545.780, RSMo. 1978.
>
> "(3) However, in 1980, the General Assembly provided: 'Under no circumstances may the expenditures from general revenue for the purposes provided in Sections 600.010 to 600.160 exceed the amount, five million dollars, if and when appropriated by the General Assembly for such purposes.' Section 600.160, RSMo. Supp. 1980.

"(4) And, for the fiscal year ending June 30, 1981, the General Assembly appropriated only a total of $3,475,894 for representation of indigent defendants.

"We must recognize that as of the date of this opinion the money appropriated by the General Assembly for the fiscal year ending June 30, 1981, has been spent. The cupboard is bare."

The aspect of the present situation which concerns this writer and I believe most of the members of the Missouri Bar is the fact that this Court has, without saying so, overruled the Missouri cases which have recognized and applied the inherent power doctrine. Under the inherent power doctrine, this Court does have an effective remedy if it chooses to use it.

If, however, this Honorable Court in the exercise of its collective wisdom does not wish at the present time to use its inherent power to mandamus the legislative branch to adequately fund the public defender system, we respectfully suggest, and even pray that this Court will grant a rehearing herein and thereafter write an opinion which will recognize the Court's right to apply the inherent power doctrine, and to amend its present opinion to make it clear that the inherent power doctrine is still alive and viable in the State of Missouri.

For the reasons hereinabove stated on behalf of the members of the Missouri Bar, we pray this Court to grant a rehearing to the relator in the above entitled case.

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Opposition

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No. 81-257

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF MISSOURI ex rel.
DONALD L. WOLFF,
Petitioner,

v.

HONORABLE JAMES RUDDY, JUDGE,
Circuit Court, St. Louis County,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSOURI

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED FOR REVIEW

a. Does the appointment of an attorney to represent an indigent criminal defendant without compensation violate the Fifth Amendment proscription against the taking of private property without due process of law or just compensation?

b. Does the appointment of an attorney to represent an indigent criminal defendant without compensation violate the Thirteenth Amendment proscription against involuntary servitude?

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No. _____

IN THE

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ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSOURI

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

OPINION BELOW

The order of the Supreme Court of Missouri, overruling petitioner's action in prohibition, dated May 7, 1981, is reported at 617 S.W.2d 64 (Mo. 1981) and is attached in appellant's brief as Appendix A. The petition for rehearing and order overruling said petition are attached in appellant's brief as Appendices B and C.

JURISDICTIONAL STATEMENT

This Court has jurisdiction of this Petition for Writ of Certiorari pursuant to 28 U.S.C. 1257(3), which provides that this Court may review the final judgment of the Missouri Supreme Court where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1) United States Constitution, Amendment V, provides:

> No person shall . . . be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

2) United States Constitution, Amendment XIII, provides:

> Section 1. Neither slavery not involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

3) Rule 8.11, V.A.M.R., provides:

> Every person, before being admitted to practice law in this State, shall take and subscribe the following oath or affirmation (substituting, in instances of affirmation, the word "affirm" for the word "swear" in the first line of such text, and further substituting the words "Under the pains and penalties of perjury" in lieu of the words "So help me God" in the last line thereof):

I do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of Missouri;

That I will faithfully demean myself in my practice to the best of my knowledge and ability;

That I will maintain the respect due to courts of justice and judicial officers;

That I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

That I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;

That I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with any client's business except from my client or with my client's knowledge and approval;

That I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

That I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any person's cause for lucre or malice. So help me God. [Emphasis added].

4) Section 600.150, RSMo 1978, provides:

1. Counsel, other than a public defender, appointed by a court in any circuit to represent an

> indigent person shall, at the conclusion of the representation, or any part thereof, be reimbursed for actual expenses reasonably incurred for investigative, mental and physical examinations, expert or other services necessary in the representation or defense of the person . . . The court may allow the claim for reimbursement of expenses and the court shall, in addition, fix a reasonable fee for the services of counsel to be paid to such counsel for the representation, . . . Both the reimbursement of expenses and the attorney's fee for services shall be paid by the state from funds appropriated for that purpose.

STATEMENT OF THE CASE

On March 27, 1981, the petitioner was notified by court memorandum that it was the intention of the respondent, on April 15, 1981, to appoint the petitioner to represent Joann Williams, an indigent charged with three counts of Robbery, First Degree, unless prohibited by the appellate court. The respondent further advised that because of the circumstances of the appointed counsel fund, the petitioner would not be paid or reimbursed for any of his expenses.

On April 14, 1981, the petitioner applied to the Missouri Supreme Court for a writ of prohibition against the respondent, at which time he requested and was granted a stay order commanding the respondent to refrain from making the appointment until further order of the court.

A preliminary rule in prohibition was officially issued on April 23, 1981, returnable on or before May 4, 1981. On that same day, the court sustained the motion of the Missouri Association of Criminal Defense Lawyers to file a brief as amicus curiae. Permission was also granted to the Missouri Bar Association to file a brief as amicus curiae.

On oral request of the respondent, the court extended the return date of the preliminary rule to May 11, 1981, and on May 7, 1981, the court, *sua sponte*, issued its opinion and order quashing the preliminary rule in prohibition. Finally, on June 8, 1981, the court entered an order denying the petition for rehearing.

SUMMARY OF ARGUMENT

The Supreme Court of Missouri did not fail to protect the petitioner's constitutional right of freedom from the taking of property without just compensation or the right to freedom from involuntary servitude by denying his writ of prohibition, because: (1) the appointment of an attorney to represent an indigent criminal defendant without compensation does not violate the Fifth Amendment proscription against the taking of private property without due process of law or just compensation, and (2) the appointment of an attorney to represent an indigent criminal defendant without compensation does not violate the Thirteenth Amendment proscription against involuntary servitude.

ARGUMENT

I. Appointment of members of the private bar to represent indigent criminal defendants without compensation is a practice long endorsed by the courts; such practice does not violate the Constitution of the United States.

a. The appointment of an attorney to represent an indigent criminal defendant without compensation does not violate the Fifth Amendment proscription against the taking of private property without due process of law or just compensation.

The Fifth Amendment to the United States Constitution provides:

> No person shall . . . be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation. Constitution of the United States, Amendment V.

The appellant asserts that compelling an attorney to represent an indigent criminal defendant without compensation or reimbursement violates his constitutional rights and constitutes the taking of his property without due process of law or just compensation. In response, respondent argues that attorneys are officers of the court, bound by their professional oath to accept court appointment to represent indigents whether or not they will be compensated.

The representation of indigents is a traditional professional obligation of the bar, rooted in the common law.

> Representation of indigents upon court order is an ancient tradition of the legal profession, going as far back as fifteenth-century England and pre-Revolutionary America. And yet counsel appointed to represent indigents have rarely received anything more than statutory fees which generally do not pay a lawyer what

> he could get elsewhere for his services. Thus, when a court requires a lawyer to represent an indigent without any compensation, or for less compensation than he could get elsewhere, the court is merely requiring the lawyer to discharge an obligation which is part of the professional tradition he assumed upon becoming a lawyer. There is no "taking." *United States* v. *Dillon*, 346 F.2d 633, 636 (9th Cir. 1965).

In fact, the great majority of courts which have passed on the question of compensation have denied claims of appointed counsel for compensation, reaffirming the principal that representation of indigents under court order without compensation is a traditional obligation of the bar and a condition which attorneys licensed to practice as officers of the court accept when they accept a license to practice law. *See, Posey & Tompkins* v. *Mobile County*, 50 Ala. 6 (1873); *Arkansas County* v. *Freeman & Johnson*, 31 Ark. 266 (1876); *Lamont* v. *Solano County*, 49 Cal. 158 (1874); *Rowe* v. *Yuba County*, 17 Cal. 61 (1860) (Field, J.); *Elam* v. *Johnson*, 48 Ga. 348 (1873); *Vise* v. *County of Hamilton*, 19 Ill. 78 (1857); *Johnson* v. *Whiteside County*, 110 Ill. 22 (1884); *Johnston* v. *Lewis and Clarke County*, 2 Mont. 159 (1874); *People ex rel. Whedon* v. *Board of Supervisors*, 192 App.Div. 705, 183 N.Y.S. 438 (3d Dep't, 1920); *Washoe Co.* v. *Humboldt Co.*, 14 Nev. 123, 128 (1879); *Wayne County* v. *Waller*, 90 Pa. 99 (1879); *Ruckenbrod* v. *Millins*, 102 Utah 548, 133 P.2d 325, 144 A.L.R. 839 (1943); *Presby* v. *Klickitat County*, 5 Wash. 329, 31 P. 876 (1892); *Nabb* v. *United States*, 1 Ct. Cl. 173 (1863); *Powell* v. *Alabama*, 287 U.S. 45 (1932) [dicta]; *United States* v. *Dillon*, 346 F.2d 633 (9th Cir. 1965) *cert. denied* 382 U.S. 978; *Dolan* v. *United States*, 351 F.2d 671 (5th Cir. 1965); *Tyler* v. *Lark*, 472 F.2d 1077 (8th Cir. 1973). Correspondingly, although many states provide by statute for some compensation for the representation of indigents,

it is clear that there is no constitutional requirement that an attorney must receive compensation for *pro bono* work.

An applicant for admission to practice law may justly be deemed to be aware of the requirements of the legal profession, realizing as he must that one of the deepest traditions of the bar is that an attorney is an officer of the court, obligated to represent indigents for little or no compensation upon court order. Armed with such knowledge, every attorney consents to court appointed representation of indigent criminal defendants when he steps into the long and noble tradition of the legal profession.

Clearly, the representation of an indigent without compensation cannot be described as a "taking without just compensation" when an attorney assumes that duty when he takes the oath to become an attorney. Simply stated, a "taking" in violation of the Fifth Amendment cannot occur when the court requires a person to fulfill a commitment he has voluntarily made. *Kunhardt and Company, Inc.* v. *United States,* 266 U.S. 537 (1925). Significantly, in *Powell* v. *State of Alabama,* 287 U.S. 45 (1932), this Court, in dicta, implied that attorneys were *obligated* to accept compulsory appointment to defend indigent defendants, stating:

> [A]ttorneys are officers of the court, and are bound to render service when required by such appointment. *Id.* at 73.

The mandate of *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), and its progeny place a special duty on the bar in the absence of an adequate, alternative provision for indigent representation. The attorneys of the Missouri Bar, as officers of the court, have ably fulfilled their obligation to indigent representation, with and without compensation, since Missouri attained statehood, long before *Gideon* became the law.

In response to the problem of uncompensated attorneys representing indigents, the Missouri Supreme Court, in *State* v. *Green*, 470 S.W.2d 571 (Mo. banc 1971), expressed a policy that the legal profession need not continue to bear the burden of indigent representation alone. In response to *Green*, in 1972, the Missouri General Assembly declared that "the reimbursement of expenses and attorneys' fees for services shall be paid by the state from funds appropriated for that purpose". § 600.150, RSMo 1978. Unfortunately, on the date of the petitioner's appointment to represent an indigent defendant, the money appropriated by the General Assembly for the fiscal year ending June 30, 1981, had been entirely spent. No funds were available for attorneys who were ordered to defend indigent criminals. Courts were forced to appoint attorneys to handle the dispositions of these cases without compensation. Suddenly, the concurring opinion of Judge Robert Seiler in *Green* took on the mantel of prophecy:

> Courts cannot operate without lawyers. . . . The judge and the lawyers together are necessary for the courts to function. The lawyers cannot escape being officers of the court and cannot escape a certain amount of pro bono publico work, which inevitably go with the special and exclusive privilege of being allowed to represent others in the court. Despite the increasing (and I think regrettable) trend toward commercialization of the law profession, these obligations remain a part of the practice of law and I believe thoughtful lawyers would not want it otherwise.
>
> It is impossible at this writing to foresee all the contingencies which may arise in the representation of indigents in criminal cases, . . . There are certain to be instances, however, where the courts find it necessary to appoint counsel to represent an indigent, without compensation for time spent or reimbursement for out-

> of-pocket expenses. I do not take the opinion in today's case to mean the courts are surrendering their power to require a lawyer to perform his obligation as an officer of the court, even if it means doing so without financial reward or reimbursement. It would be a sad day for the courts and the profession if we get to the point where there is no obligation for a lawyer to serve as an officer of the court unless he is first assured of a fee. *Id.* at 574, 575.

It is clear that the Missouri Supreme Court has now adopted the Seiler opinion in its holding in the case at bar, confirming that *Green* turned not on a constitutional issue, but on policy considerations. In so doing, the Missouri Supreme Court has affirmed its understanding that it is an attorney's duty, as a member of the legal profession, to represent indigent criminal defendants.

> We expect each member of the legal profession, as he or she has throughout history, to continue to honor the oath "that I will never reject, from consideration personal to myself, the cause of the defenseless or the oppressed. . . ." *State of Missouri ex rel. Wolff* v. *Ruddy,* 617 S.W.2d 64, 67 (Mo. 1981).

b. The appointment of an attorney to represent an indigent criminal defendant without compensation does not violate the Thirteenth Amendment proscription against involuntary servitude.

The Thirteenth Amendment to the United States Constitution in part provides:

> Section 1. Neither slavery not involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Constitution of the United States, Amendment XIII.

The argument advanced by petitioner that his appointment to represent a criminal defendant without compensation delegates him to involuntary servitude in contravention of the Thirteenth Amendment has found few proponents among the judiciary. In fact, neither we nor petitioner have uncovered a majority appellate decision which adopts petitioner's view. See, *Sontag* v. *State*, 629 P.2d 1269 (Okla. 1981).

Involuntary servitude is by definition *involuntary*. As has been argued herein, *supra*, an attorney comes to the bar with a consciousness of the traditions of the bar. By accepting his license to practice with the words,

> I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed . . . , Rule 8.11, V.A.M.R.,

an attorney *voluntarily* and without hint of servitude accepts all that it means to be an officer of the court.

Admittedly, there exists a statutory provision in Missouri allowing compensation for attorneys appointed to represent indigent criminal defendants. § 600.150, RSMo 1978 (Laws of Missouri, 1972, pp. 1035 *et seq.*). However, and unfortunately, as petitioner states, the statute was not funded sufficiently by the Missouri General Assembly to allow payment to petitioner. Nevertheless, the petitioner would throw out any hope of compensation by having § 600.150 declared unconstitutional under the Thirteenth Amendment and the inherent power doctrine adopted by the Missouri Supreme Court and defined in *State ex inf. Anderson ex rel. Weinstein* v. *St. Louis County*, 421 S.W.2d 249 (Mo. 1967), while unable to cite extant authority for his Thirteenth Amendment argument and ignoring the Missouri Supreme Court's clear refusal to employ the inherent power doctrine in this case.

Petitioner is a proficient, highly respected member of the criminal bar. He has traveled the path of a criminal case many times. He is familiar with its many twists and turns.

Petitioner has not claimed an undue hardship would befall him should he be required to carry out his appointment. Although alleging that his normal fee and expenses for defending a similar case would be $15,000.00 (Petition for Writ of Certiorari, p. 5), payment to petitioner under a fully funded § 600.150, RSMo, would be considerably less than that.

In short, petitioner (understandably) decries the *inconvenience* of his appointment under the guise of a constitutional attack. While all involved regret the circumstances which have brought us to this juncture, the Constitution does not protect us from the inconvenience imposed by the profession we have freely undertaken.

> [I]t is a duty which counsel so designated owes to his profession, to the court engaged in the trial, and to the cause of humanity and justice, not to withhold his assistance nor spare his best exertions, in the defense of one who has the double misfortune to be stricken by poverty and accused of crime. *No one is at liberty to decline such an appointment, and few, it is to be hoped, would be disposed to do so.* . . . (Emphasis added). I Cooley, Constitutional Limitations 700 (1927)

CONCLUSION

Respondent respectfully contends that a Writ of Certiorari should not be issued inasmuch as there are no appropriate constitutional issues before the Court for decision.

Respectfully submitted,

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Amicus Brief

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No. 81-257

IN THE

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HON. JAMES RUDDY, JUDGE, Judge, Circuit Court,
St. Louis County,
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BRIEF OF AMICUS CURIAE THE MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER DONALD L. WOLFF'S PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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This Amicus brief offered herein by the Missouri Association of Criminal Defense Lawyers is an expression of the views of over 200 active practitioners in Missouri devoting most, if not all of their time to the practice of criminal law. We believe that the order of the Supreme Court of Missouri in this cause is inadequate, and amounts a deprivation of the rights of the petitioner under the Fifth, Thirteenth and Fourteenth Amendments to the Constitution of the United States.

Since 1971 the burden of indigent defendants has increased greatly. The crime rate is growing by leaps and bounds. Appointed counsel is now needed in misdemeanor cases where con-

finement is imposed. *Argersinger* v. *Hamlin,* 407 U.S. 25, 92 S.Ct. 2006 (1972) and in prisoner post conviction habeas corpus and motion to vacate proceedings. *Bounds* v. *Smith,* 430 U.S. 817, 97 S.Ct. 1491, (1977); *Fields* v. *State,* (Mo. en banc. 1978) 572 SW2d 477. Court apointed attorneys have even been required in paternity cases, *Reynolds* v. *Kimmons,* (Alaska 1977) 569 P.2d 799.

The federal government and the various states, including Missouri, have adopted statutes and rules authorizing payment of appointed counsel. See *County of Dane* v. *Smith,* 13 Wis. 585 (1861); *Smith* v. *State,* (N.H. 1978) 394 A.2d 834, holding statutory scheme for payment of appointed counsel unconstitutional because of inadequate compensation being afforded (due to inflation); *People ex rel Conn* v. *Randoiph,* 35 Ill.2d 24, 219 NE2d 337 (1966), holding statutory maximum in a given case may be unconstitutional; *State ex rel Partain* v. *Oakley,* (W.Va. 1976) 227 SE2d 314, indicating a constitutional violation would be present if the burden of service is so substantial as to be confiscatory; *Kovarik* v. *County of Banner,* 192 Neb. 816, 224 NW2d 761.

The burden of free representation (especially in these years of economic crisis, depressions, recessions, panics, inflation, high interest rates and unemployment) makes all the more meaningful Senator Sam J. Ervin's warning that, "the lawyer himself should not fear indigency while defending the indigent." *49 ABA Journal 435.*

All of the cases denying a compensation right allude to the principal that an attorney has the traditional duty to represent indigents and he is not entitled to compensation unless there is statutory authority for such payment. In Missouri there is a statutory requirement for payment. *Sec. 600.150,* R.S.Mo. 1976, but Petitioner, had he accepted the appointment, would still not have been paid.

In *Sparks* v. *Parker,* (Ala. 1979) 368 So.2d 528, 541. the Court said:

> "It is therefore not within the sphere of the judicial branch to determine what appropriations are to be made although, of course, it would be within our purview to determine if the appropriations made are 'adequate and reasonable' for the unified judicial system or so inadequate as to constitute the taking of property (services) without due process of law in the context of this case."

In *Bradshaw* v. *Ball,* (Ken. 1972) 487 SW2d 294, the court ticked off a few reasons why the system of uncompensated appointed counsel was no longer just and has become intolerable. The court mentioned: the increased crime rate; expansion by the U.S. Supreme Court decisions of federal constitutional standards; rapidly changing concepts of such matters as confessions, search and seizure, joinder of defendants, right to counsel, etc., which make criminal defense more time consuming; the impact of the right of indigent, without costs, to appeal, file post conviction proceedings, and seek federal remedies. To this list should be added the tremendous impact of the speedy trial act, *Sec. 545.780,* R.S.Mo. 1978; the growth in "paper work", the astronomical increase in office and automobile overhead; the decrease in the ability of fee clients to pay, with resulting necessity to accept more clients; the growing trend for indigent defendants to insist on their day in court; the movement to eliminate or curtail plea bargaining; the increase in the number of judges and prosecutors who are available to try cases; reverse discovery and notice of defense rules; the publication of more "essential" books to read; the continual amendment of court rules; the increase in number of appellate decisions with which to become familiar; the higher standard of care required of appointed attorneys; the increased use of forms to complete; and the general increase in the tempo of life. In *Bradshaw* the court said, loc cite 298, the time had arrived "to declare the burden of such service a substantial depreivation of property and constitutionally infirm."

In *Menin* v. *Menin,* 79 Wisc.2d 285, 359 N.Y.S.2d 721, (1974) aff'd 48 App.Div.2d 904, 372 N.Y.S.2d 983, the state sought to require attorneys to handle divorce cases for indigents without adequate compensation. This was held to be a denial of due process. In *Bounds* v. *Smith, supra,* 825, 1496, the Supreme Court said, "State expenditures are necessary to pay lawyers for indigent defendants at trial."

A statutory scheme for the payment of compensation to appointed counsel has been enacted in Missouri, but the scheme has failed because the legislature has failed and refused to appropriate sufficient funds, even appropriating less than the maximum set out in Section 600.160, R.S.Mo. 1980, of $5,000,000. In *Knox County Council* v. *State ex rel McCormick,* 217 Ind. 493, 29 NE2d 405, 130 ALR 1427 (1940), it was held that the court that appointed counsel had the inherent power to order compensation, and that that could not depend on the whim of the legislature. See also *People ex rel Conn* v. *Randolph, supra.*

Common sense tells us that compensated counsel, who will receive reimbursement for his expense, is more likely to be competent counsel.

Senator Sam J. Ervin, Jr., in "*Uncompensated Counsel: They Do Not Meet The Constitutional Mandate,*" *49 A.B.A. Journal* 436 (1963), said:

> "A fundamental principal of our nation is that law, not force, maintains the social order, and yet each year thousands of defendants are brought before the federal bench without benefit of paid counsel. The forces of the government, with experienced prosecutors, trained investigating staffs and expert witnesses, are pitted against a defendant whose appointed counsel must find the spare time to defend without compensation...."

He went on to quote the remarks of Judge Augustus N. Hand, Chairman of the Judicial Conference of the United States, who had said:

> "To distribute such assignments (unpaid service to indigents) among a large number of attorneys, in order to reduce the burden upon anyone, is to entrust the representation of the defendant to attorneys who in many cases are not proficient in criminal trials, whatever their general ability, and who for one reason or another cannot be depended upon for adequate defense. Too often, *under such circumstances, the representation becomes little more than a form.*"

Thus, of course, the constitutional right of Joanne Williams to effective and competent counsel must also be considered. The study by the American Bar Association Standing Committee on Legal Aid and Indigent Defense, was reported on by S. Shepherd Tate, then president of the ABA, in October, 1978, *64 A.B.A. Journal 1463.* Mr. Tate said that study revealed:

> "...that a majority of all persons who pass through our criminal courts each year require the appointment of counsel because of their indigency. I learned that the resources devoted to the provision of counsel are so grossly inadequate that overburdened, underpaid, and inadequately trained lawyers frequently provide little more than token representation. I learned that all too many of our citizens are not being provided their Sixth Amendment right to effective assistance of counsel simply because they are poor.
>
> Not only the defendant - who, we must remember, is presumed innocent - suffers because of this. Society in general is harmed..."

Mr. Tate continued:

> "This responsibility deeply disturbs me. I firmly believe that governments not lawyers, have the real power and responsibility to ensure justice for the poor. Lawyers should not be expected to finance programs to provide people their constitutional rights. Mandating lawyers to pay for indigent criminal defense services is like requiring architects and engineers to pay for public housing or requiring teachers to pay for schools in poverty areas.
>
> It is clear that poor people want and are entitled to effective assistance of competent counsel as a matter of right and not grace. Responsibility must be placed in the only institutions capable of providing this constitutional mandate: local, state and federal governments."

Mr. Tate concluded:

> "....effective assistance of counsel is more valid in theory than in practice...."

Mr. Tate then called for adequate governmental funding for indigent defense systems.

The inadequate funding of the Public Defender system in Missouri, which would have resulted in Petitioner being required to expend his time and own funds in order to represent Ms. Williams, would have resulted in a taking of the Petitioner's property, as well as his liberty, without due process of law.

When the tradition of uncompensated appointed service (if there be such a tradition that has developed the force of law) came into existence no one dreamed of the extent to which that need for appointed counsel would grow; nor did anyone dream of the financial burdens such an appointment would involve; and certainly no one foresaw the Catch 22 in which appointed counsel would find himself involved. The viability of that tradi-

tion has disappeared because of the enactment of statutes providing for compensation to appointed counsel in federal and most states. The constitutional obligation to provide and pay for legal assistance for the poor is the obligation of the state and not the individual obligation of Petitioner, or any other private attorney that might be appointed to represent a criminal defendant. No other profession, whether licensed or unlicensed, whether privileged or unprivileged, has such an obligation. To require any other person to give away his talents and his property, plus requiring such person to expend his own funds to pay the costs and expenses of such gift, without compensation, would no doubt violate the *Fourteenth Amendment*. Why should any attorney be treated differently?

For the reasons herein above set forth on behalf of the Missouri Association of Criminal Defense Lawyers, we respectfully submit that the Petition for Writ of Certiorari filed herein be issued to review the judgment and order of the Missouri Supreme Court.

Respectfully submitted,

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Amicus Brief

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No. 81-257

IN THE

Supreme Court of the United States

JULY TERM, 1981

STATE OF MISSOURI *ex rel*,
DONALD L. WOLFF,
Petitioner,

vs.

HON. JAMES RUDDY, JUDGE,
Judge, Circuit Court, St. Louis County,
Respondent.

BRIEF OF AMICUS CURIAE, THE MISSOURI BAR, IN SUPPORT OF PETITIONER DONALD L. WOLFF'S PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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This Amicus brief offered herein by The Missouri Bar attempts to express what the author hereof believes represents the view of at least a majority of the lawyers in the State of Missouri.

First we wish by reference to include as a part of this brief the Suggestions on Behalf of The Missouri Bar which are included in the Petition For a Writ Of Certiorari To The Missouri Supreme Court, filed in this Court and which Suggestions are included in the petition as Appendix D.

Secondly, we believe that the dissenting opinion written by then Chief Justice Finch of the Missouri Supreme Court, expresses the positions and feelings of a large majority of the

members of The Missouri Bar. For that reason and because the writer of this brief could not express the points made in that opinion nearly as well as therein written, we take the liberty of quoting extensively from that dissent as it appears in 470 S.W.2d at page 574.

FINCH, Chief Justice (dissenting).

I would affirm the judgments of the trial courts allowing attorneys' fees and reimbursement of expenses, and hence I must dissent from the principal opinion. I express my reasons in considerable detail because of the great importance I attach to the problem presented.

The resolution of the ultimate issue of whether these claims were properly allowed involves several questions. The first of these is whether appointment of counsel was required. I agree with the conclusion in the principal opinion that such appointments were necessary under Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799. Furthermore, the court was obligated to appoint counsel under the terms of § 545.820, V.A.M.S., which provides as follows:

"If any person about to be arraigned upon an indictment for a felony be without counsel to conduct his defense, and be unable to employ any, it shall be the duty of the court to assign him counsel, at his request, not exceeding two, who shall have free access to the prisoner at all reasonable hours."

Actually, an obligation to furnish counsel to indigent defendants has been recognized by the State of Missouri since its very earliest days. The predecessor of § 545.820 was first enacted in 1825 (Laws 1825, Ch. 11, § 22, p. 319) and the statute has been carried forward virtually unchanged to the present time. A similar provision was in force in territorial days. See Digest of the Laws of the Missouri Ter-

ritory, 1818, Crimes and Misdemeanors, § 35. Also, Supreme Court Rule 29.01(a), V.A.M.R., provides that an accused has the right to appear and defend by counsel, and that if a person charged with the commission of a felony is indigent and unable to employ counsel, the court, on request, has the duty to appoint counsel to represent him. It is crystal clear, therefore, that in the administration of justice in this state the trial court in these two cases had no choice other than to appoint counsel to represent these defendants after the court had determined that they were indigent and unable to employ counsel themselves.

The second question presented is whether attorneys so appointed are entitled to be compensated for their services and reimbursed for their out-of-pocket expenses if they so request. I agree with the principal opinion that this is a question for the judicial department, but, contrary to that opinion, I would hold that the attorneys were so entitled in these cases.

Historically, the lawyers of this state have accepted appointment in indigent cases and as a public service have represented defendants therein without compensation. They were officers of the court and when asked to serve, have done so. This system has continued to the present time except in certain local areas where some of the task of defending such cases has been assumed, in part, by local public defender or legal aid offices.

The history of handling indigent criminal cases without compensation or reimbursement has led many persons to conclude that because the state has licensed the attorney to practice law, he is required, as an incident of that license, to serve by appointment in indigent cases without compensation or reimbursement of expenses. At the same time, people do not expect others, even if licensed by the state, to furnish services gratis. For example, in the prosecution

of criminal cases, the state is represented in the trial court by a prosecuting attorney and on appeal by the attorney general. No one would suggest that their license obligates them to serve in these cases without compensation. The services of doctors, dentists, and psychiatrists, including examinations for the purpose of testifying in the trial, often are required on behalf of persons accused or convicted of crime. These professional people, all licensed for such practice, are not expected to, and do not, as a general proposition, perform these services without compensation. Jails and prisons in which to house those charged with or convicted of offenses are required, and architectural and engineering services are necessary to design and build such facilities. Architects and engineers, although licensed by the state, are not expected to do this as a public service without compensation. Neither is the contractor and building material supplier expected to construct such facilities without compensation. No individuals are asked to feed or clothe them as a public service. The same can be said of many others who provide various kinds of services and goods for indigents accused of crime, or for that matter, for other indigents not involved in criminal proceedings but to whom the state furnishes services. Examples are legion.

What reason is there, then, that attorneys should be asked or expected to assume this heavy burden and serve without compensation and at their own expense? I perceive none.

The third question presented is whether the courts of Missouri have authority to allow compensation and expenses as costs, as the courts did here. I find no difficulty in concluding that the trial courts did have such power.

In the first place, § 545.820 made mandatory the appointment of counsel to represent these defendants. While it makes no provision as to compensation to be allowed for

the services performed, the courts in appointing attorneys were acting in obedience to express statutory authority and direction. Necessarily, an obligation arises on the part of the state to pay for the services rendered pursuant to that statutory mandate.

Secondly (and more importantly), the court had an inherent right to order payment of the attorneys' fees and expenses as court costs irrespective of the existence of § 545.820. This court on numerous occasions has recognized and stated the principle that courts of general jurisdiction have the inherent power to do those things reasonably necessary to preserve their existence and function as a court, including the right to appoint persons needed to perform services essential to the functioning of the court. Such cases include Clark v. Austin, 340 Mo. 467, 101 S.W.2d 977; State *ex rel.* Gentry v. Becker, 351 Mo. 769, 174 S.W.2d 181; Pogue v. Swink, 365 Mo. 503, 284 S.W.2d 868; State *ex inf.* Anderson v. St. Louis County, Mo., 421 S.W.2d 249; and State *ex rel.* Weinstein v. St. Louis County, Mo., 451 S.W.2d 99.

I strongly believe that these cases should be affirmed. Hopefully, the General Assembly will provide a permanent solution by a statewide public defender system or some other method of providing paid counsel for indigent defendants. If that is not done, we are in real trouble in the field of criminal law enforcement when September 1, 1972, arrives, unless at that time the majority no longer abstain from action and instead exercise the inherent authority which, in my judgment, must and does exist.

It is true that since the opinion in *State* v. *Green, supra,* the Missouri General Assembly has developed a partial plan for dealing with the defense of indigents. But the fact is, that due to the failure of the General Assembly to appropriate sufficient funds, the same problems encountered in *State* v. *Green* still ex-

ist. Please see pp. 17 and 18 of the Petition for a writ of certiorari filed by petitioner Donald L. Wolff herein.

For the reasons hereinabove set forth on behalf of The Missouri Bar, we respectfully submit that the petition for a writ of certiorari filed herein be issued to review the judgment and order of the Missouri Supreme Court filed herein.

Respectfully submitted,

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